Sealdeck (Kuala Lumpur) Sdn Bhd v Onn Choon Koi @ Ng Ching Kwai

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3(S4)–22–430 OF 1997
MOHD HISHAMUDIN J
25 FEBRUARY 2008

Contract — Agreement — Tenancy agreement — Express condition imposed on land title — Whether defendant misrepresented to plaintiff that there was no restriction on usage imposed on land — Whether plaintiff had means of discovering truth with ordinary diligence

Contract — Tenancy agreement — Breach — Express condition imposed on land title — Whether object of agreement was unlawful — Whether tenancy agreement void and unenforceable by either party — Contracts Act 1950 s 24 — National Land Code s 127

Landlord and Tenant — Creation — Tenancy — Agreement — Whether tenancy agreement void and unenforceable by either party — Contracts Act 1950 s 24 — National Land Code s 127

The defendant, the registered owner of a piece of land in Sungai Buloh, Selangor ('the land') entered into a tenancy agreement with the plaintiff to let out the land for a term of three years. The tenancy agreement although signed on 23 March 1996, was to take effect from 1 January 1996 and to determine on 31 December 1998. The rent for the land was agreed at RM4,500 per month and the plaintiff agreed to pay a deposit of the two months rent in advance, amounting to RM9,000. According to the terms of the tenancy agreement, the purpose of the tenancy was to allow the plaintiff to construct a single storey building on the land for the purpose of the plaintiff's business. However, there was an express condition imposed on the land that provided that the land could not be used for business purposes but only for residence. Subsequent to entering into the tenancy agreement, the plaintiff erected a single storey building for the purpose of storing its trade stocks. When the plaintiff was prevented from erecting any building on the land or to continue to use the land as it intended, it terminated the tenancy agreement and proceeded with this suit against the defendant for misrepresentation and breach of the tenancy agreement. The defendant in turn counterclaimed

against the plaintiff for breach of the same tenancy agreement. The plaintiff contended that there was a misrepresentation by the defendant when the latter, as the landlord, had said that there was no condition imposed on the usage of the land to prevent the plaintiff from erecting a building on the land for the plaintiff's business purposes. The plaintiff further contended that the defendant did not disclose to the plaintiff that the defendant had in fact sold the land to a third party and that the third party by obtaining a restraining order to prevent the plaintiff from erecting any building on the land had prejudiced the plaintiff's interest in the land. The defendant on his part alleged that it was the plaintiff who had breached the tenancy agreement by erecting a building on the land without first obtaining the permission of the State Authority. The defendant also counterclaimed against the plaintiff for the non-payment of the monthly rentals from 1 March 1996 until 31 December 1998.

Held, dismissing the claim and counterclaim with no order as to costs:

(1) The tenancy agreement was void by reason of s 24(a) of the Contracts Act 1950 ('the Act') and thus unenforceable by either party. In the present case, the purpose of the tenancy agreement, as evidenced by the tenancy agreement, was to enable the plaintiff to erect a building on the land for business purposes. Thus, the purpose of the tenancy agreement, as envisaged by the parties, was something that was forbidden by the express condition imposed on the title of the land, meaning that the purpose was forbidden by law and in particular s 127 of the National Land Code ('the NLC'). Section 127 of the NLC provides for the sanction for any breach of condition imposed on any alienated land. According to the provisions of s 127 of the NLC, if there is any breach of condition, the land is liable to forfeiture or alternatively the proprietor is liable to be fined by the land administrator (see para 16).

(2) It was no defence for the plaintiff to say that it was not aware of the condition endorsed on the land title as ignorance of the law was no excuse. In any case, it was incumbent upon the plaintiff to do a land office search before carrying out its commercial activities on the land and any failure to do so will be construed as recklessness on its part (see para 18).

(3) Although the plaintiff had alleged misrepresentation in its action against the defendant, this allegation of misrepresentation was baseless. The plaintiff had the means of knowing about the condition imposed on the title of the land by means of a simple land search at the land office. In this respect, the exception to s 19 of the Act would apply (see para 19).

(4) By reason of s 66 of the Act the defendant must refund to the plaintiff the RM9,000 that had been paid by the plaintiff to the defendant as a deposit under the tenancy agreement (see para 17).

[Bahasa Malaysia summary

Defendan, pemilik berdaftar sekeping tanah di Sungai Buloh, Selangor (tanah tersebut) memasuki perjanjian penyewaan dengan plaintif untuk menyewakan tanah tersebut untuk tempoh tiga tahun. Perjanjian penyewaan tersebut walaupun ditandatangani pada 23 Mac 1996, mula berkuatkuasa dari 1 Januari 1996 dan akan tamat pada 31 Disember 1998. Sewa untuk tanah tersebut dipersetujui sebanyak RM4,500 sebulan dan plaintif bersetuju untuk membayar terlebih dahulu deposit untuk dua bulan, berjumlah sebanyak RM9,000. Mengikut terma-terma penyewaan, tujuan penyewaan adalah untuk membenarkan plaintif membina bangunan satu tingkat di atas tanah tersebut untuk tujuan perniagaan plaintif. Walau bagaimanapun, terdapat syarat nyata dikenakan ke atas tanah yang memperuntukkan bahawa tanah tersebut tidak boleh digunakan untuk tujuan perniagaan tetapi hanya untuk tempat tinggal. Selepas memasuki perjanjian penyewaan, plaintif mendirikan bangunan satu tingkat untuk tujuan menyimpan stok perniagaannya. Apabila plaintif dihalang daripada mendirikan apa-apa bangunan di atas tanah tersebut atau terus menggunakan tanah seperti yang diniatkan, ia menamatkan kontrak dan meneruskan dengan guaman ini terhadap defendan untuk misrepresentasi dan kemungkiran perjanjian penyewaan. Defendan sebaliknya menuntut balas terhadap plaintif untuk kemungkiran kontrak perjanjian penyewaan tersebut. Plaintif berhujah bahawa terdapat misrepresentasi oleh defendan apabila defendan, sebagai tuan tanah, telah menyatakan bahawa tidak terdapat syarat yang dikenakan ke atas penggunaan tanah tersebut untuk menghalang plaintif daripada mendirikan bangunan di atas tanah tersebut untuk tujuan perniagaan plaintif. Plaintif selanjutnya berhujah bahawa defendan tidak mendedahkan kepada plaintif bahawa defendan sebenarnya telah menjual tanah tersebut kepada pihak ketiga dan bahawa pihak ketiga dengan memperolehi perintah pencegahan untuk menghalang plaintif daripada mendirikan apa-apa bangunan di atas tanah tersebut telah memprejudiskan kepentingan plaintif di atas tanah tersebut. Defendan bagi pihaknya mendakwa bahawa ia adalah plaintif yang memungkiri perjanjian penyewaan tersebut dengan mendirikan bangunan di atas tanah tersebut tanpa mendapatkan izin Pihak Berkuasa Negeri terlebih dahulu. Defendan juga menuntut balas terhadap plaintif untuk sewa bulanan yang belum dibayar dari 1 Mac 1996 sehingga 31 Disember 1998.

Diputuskan, menolak tuntutan dan tuntutan balas tanpa perintah terhadap kos:

(1) Perjanjian penyewaan tersebut adalah batal atas sebab s 24(a) Akta

Kontrak 1950 ('Akta tersebut') dan oleh itu tidak boleh dikuatkuasakan oleh kedua-dua pihak. Dalam kes ini, tujuan perjanjian penyewaan, seperti yang dijelaskan oleh perjanjian penyewaan tersebut, membolehkan plaintif untuk mendirikan bangunan di atas tanah tersebut untuk tujuan perniagaan. Oleh itu, tujuan perjanjian penyewaan, seperti yang dinyatakan oleh pihak-pihak, adalah sesuatu yang dilarang oleh syarat jelas yang dikenakan ke atas hak milik tanah tersebut, maksudnya tujuan tersebut dilarang oleh undang-undang dan s 127 Kanun Tanah Negara ('KTN)' khususnya. Seksyen 127 KTN memperuntukkan sanksi untuk apa-apa kemungkiran syarat yang dikenakan atas apa-apa tanah beri milik. Mengikut peruntukan-peruntukan s 127 KTN, jika terdapat apa-apa kemungkiran syarat, tanah tersebut boleh dirampas atau secara alternatif pemilik boleh didenda oleh Pentadbir Tanah (lihat perenggan 16).

(2) Ia bukan pembelaan kepada plaintif untuk menyatakan bahawa ia tidak mengetahui mengenai syarat yang diendorskan ke atas hak milik tanah tersebut kerana ketiadaan pengetahuan mengenai undang-undang bukan satu alasan. Walau bagaimanapun, adalah wajib ke atas plaintif untuk membuat pencarian pejabat tanah sebelum menjalankan aktiviti-aktiviti perniagaan ke atas tanah tersebut dan apa-apa kegagalan untuk berbuat demikian akan ditafsirkan sebagai kelalaian olehnya (lihat perenggan 18).

(3) Walaupun plaintif telah mendakwa misrepresentasi di dalam tindakannya terhadap defendan, dakwaan misrepresentasi ini tidak berasas. Plaintif mempunyai cara mengetahui mengenai syarat yang dikenakan ke atas hak milik tanah tersebut melalui cara pencarian tanah yang ringkas di pejabat tanah. Dalam perkara ini, pengecualian s 19 Akta tersebut beraplikasi (lihat perenggan 19).

(4) Atas alasan s 66 Akta tersebut, defendan mesti memulangkan kembali kepada plaintif wang sejumlah RM9,000 yang telah dibayar oleh plaintif kepada defendan sebagai deposit di bawah perjanjian penyewaan tersebut (lihat perenggan 17).]

Notes

For cases on breach of tenancy agreement, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 5164–5167.

For cases on tenancy, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 837–845.

For cases on tenancy agreement, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 5164–5178.

Legislation referred to

Contracts Act 1950 ss 19, 24(a), 66
National Land Code s 127

V Kumaresan (Huang Khairun Kumar & Associates) for the plaintiff.
Maurice Scully (Scully & Yoon) for the defendant.

Mohd Hishamudin J:

[1] This is an action by the plaintiff against the defendant for misrepresentation and breach of a tenancy agreement.

[2] There is a counter claim by the defendant against the plaintiff for breach of the same tenancy agreement.

[3] The defendant was the registered owner of a piece of land in Sungai Buloh, Selangor. On 23 March 1996 the defendant entered into a tenancy agreement with the plaintiff whereby the defendant let out the land to the plaintiff on a three-year tenancy. Although the tenancy agreement was signed on 23 March 1996, the tenancy, according to the terms of the agreement, was to take effect from 1 January 1996. The date of the termination of the tenancy was 31 December 1998. The rental was RM4,500 per month. In addition, the plaintiff had to pay a deposit of RM9,000. The purpose of the tenancy is stated in the third recital of the tenancy agreement, and it is as follows:

> 3. With the consent of the Landlord, the Tenant shall be allowed to construct a single storey building on the Demised land for the purpose of the Tenant's business.

[4] The tenancy agreement was prepared by the solicitors of the plaintiff, Messrs TC Leong & Co.

[5] The land in question has an express condition that states:

> Syarat-syarat Nyata
>
> Tanah yang diberi milik ini hendaklah digunakan semata-mata untuk maksud kampong dan pembinaan sebuah rumah kediaman. Rumah kediaman yang dimaksudkan itu, hendaklah didirikan dalam tempoh (2) tahun dari tarikh pendaftaran Suratan Hakmilik, mengikut jenis dan reka bentuk yang diluluskan oleh Pegawai Daerah, Petaling dan selepas itu hendaklah menjaga bangunan tersebut dengan keadaan baik setara dengan kehendak-kehendak Pihak Berkuasa Negeri atau Pihak Berkuasa Tempatan.

A **[6]** The above express condition stipulates that the land must be used only for village (kampung) purposes and for building one house for residence. Thus, the land cannot be used to erect a building for business purposes.

B **[7]** Notwithstanding the above express condition, the plaintiff from the beginning had made it known to the defendant that its sole purpose of taking the tenancy of the land was to erect a store for the purpose of storing its trade stocks.

C **[8]** Subsequent to entering the tenancy agreement, the plaintiff erected a single storey building at a cost of RM410,872.50.

[9] However, at a later date, the plaintiff terminated the tenancy agreement
D on 3 April 1997. The plaintiff did so by its solicitors' letter dated 9 May 1997. The plaintiff terminated the tenancy after having been served with an interim injunction order dated 5 November 1996 issued by the High Court of Kuala Lumpur (Civil Division) via suit No S3–22–73 of 1996 ('the 1996 suit'). In this writ action, the plaintiff was one Dr Ong Kim Chong Realty
E Sdn Bhd and the defendants were the defendant in the present action and one Toh Ah Fatt. The interim injunction order restrained the defendants and their servants and agents from erecting any building on the said land until the disposal of the action in that suit.

F **[10]** In the 1996 suit the plaintiff therein claimed, inter alia, for specific performance of an 'option agreement'. It is alleged that under this option agreement the defendant and another person by the name of Toh Ah Fatt had agreed to sell the land to the plaintiff in that action (that is, Dr Ong Kim Chong Realty Sdn Bhd) but subsequently failed to proceed with the sale
G transaction. The defendant in the present case denies signing the option agreement. In any event the 1996 suit had been discontinued after the parties therein had reached an amicable settlement.

H **[11]** Now, reverting to the present case, it is the contention of the plaintiff that there was a misrepresentation on the part of the defendant when the latter said that there was no condition imposed on the usage of the land in erecting a building on the land for the purposes of the business of the plaintiff.

I **[12]** It is also the contention of the plaintiff that the defendant did not disclose to the plaintiff that the defendant had in fact sold the land to a third party. This, according to the plaintiff, had prejudiced their interest because the third party had subsequently obtained a restraining order from the Kuala

Lumpur High Court. The plaintiff further contends that had it been made known of the purported sale to a third party it would not have taken up the tenancy.

[13] On the part of the defendant, he alleges that it was the plaintiff who had breached the tenancy agreement by erecting a building on the land without first obtaining the permission of the state authority. The defendant is also counterclaiming against the plaintiff for non-payment of monthly rentals of RM4,500 from 1 March 1996 until 31 December 1998.

[14] At the conclusion of the trial, I dismissed both the plaintiff's claim and the defendant's counterclaim; both with no order as to costs. But I ordered the defendant to refund the deposit of RM9,000 to the plaintiff.

[15] In my judgment, the tenancy agreement is void by reason of s 24(a) of the Contracts Act 1950 and thus it is unenforceable by either of the parties. Section 24(a) states:

> 24 What considerations and objects are lawful, and what not.
>
> The consideration or object of an agreement is lawful, unless:
>
> (a) it is forbidden by a law.
>
> (b) …
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

[16] In the present case, the purpose of the tenancy agreement, as evidenced by recital 3 of the tenancy agreement, was to enable the plaintiff to erect a building on the land for business purposes. Thus, the purpose of the tenancy agreement, as envisaged by the parties, is something that is forbidden by the express condition imposed on the title of the land, meaning that the purpose is forbidden by law. It is forbidden by law because it is forbidden by s 127 of the National Land Code. Section 127 of the National Land Code provides for the sanction for any breach of condition imposed on any alienated land. If there is any breach of condition, the land is liable to forfeiture; alternatively, the proprietor is liable to be fined by the land administrator. The provisions of s 127 are as follows:

> 127 Liability to forfeiture for breach of condition.
>
> (1) Upon any breach arising of any condition to which any alienated land is for the time being subject —

A (a) the land shall become liable to forfeiture to the State Authority; and

(b) except in a case where a fine is imposed under subsection (1A), or where action for the purpose of causing the breach to be remedied is first required to be taken under section 128, the Land Administrator shall proceed with the enforcement of the forfeiture in accordance with the provisions of section 129.

(1A) (a) Upon any breach as is referred to in subsection (1) arising, the Land Administrator may, instead of taking action under section 128 or 129, serve a notice in Form 7E upon the proprietor, requiring him to show cause why a fine should not be imposed in respect of such breach.

(b) Upon failure by the proprietor to show cause to the satisfaction of the Land Administrator, the Land Administrator may make an order for the payment of a fine of not less than five hundred ringgit, and in the case of a continuing breach, a further fine of not less than one hundred ringgit for each day during which the breach continues.

(1B) Where a fine is paid upon an order made under paragraph (b) of subsection (1A), no action shall be taken under section 128 or 129 in respect of the breach.

(1C) Notwithstanding subsection (1B), if the Land Administrator after due enquiry, is satisfied that the breach continues, he may serve a notice in Form 7F on the proprietor informing him of his intention to take action under section 128 or 129 upon the expiry of a period of six months from the date of service of the notice or at any time thereafter.

(2) The acceptance on behalf of the State Authority of any item of land revenue due in respect of any alienated land shall not operate as a waiver of any right of forfeiture then existing in respect of the land by virtue of this section.

(3) Land which has become liable to forfeiture under this section for breach of any condition shall cease to be so liable if —

(a) the breach is subsequently remedied, or

(b) in the case of a condition subject to fixed term, no action has been taken with respect to the breach under section 128 or 129 before the expiry of a period of twelve years beginning with the date on which the breach arose.

(4) For the purposes of this section, and of sections 128 and 129, every breach of condition shall be taken to be capable of being remedied; and the action required for remedying any breach shall be taken to consist —

(a) in the case of a positive condition of the doing of every act or thing the omission to do which constituted or formed part of the breach;

(b) in the case of a negative condition, of the doing of all such acts or things as are necessary to put the land into the state in which it would be if the breach had not occurred.

[17] By reason of s 66 of the Contracts Act the defendant must refund to the plaintiff the RM9,000 that has been paid by the plaintiff to the defendant as a deposit under the tenancy agreement.

[18] In my judgment, it is no defence for the plaintiff to say that they were not aware of the condition endorsed on the land title. Being ignorant of the law is inexcusable. In any case, it was incumbent on the plaintiff to do a land office search before carrying out their commercial activities on the said land. If they had failed to do the search, then, it was recklessness on their part. This court will not condone such recklessness.

[19] In the present case, it is to be recalled that one of the plaintiff's causes of action against the defendant is that of misrepresentation in that the plaintiff alleges that the defendant, prior to the signing of the tenancy agreement, had told the plaintiff that there was no restriction on usage imposed on the title of the land. I hold that this allegation of misrepresentation is baseless. The plaintiff had the means of knowing about the condition imposed on the title of the land by means of a simple land search at the land office. In this regard, I refer to the exception to s 19 of the Contracts Act:

Voidability of agreements without free consent.

(1) When consent to an agreement is caused by coercion, fraud, or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

(2) A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception —— If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

[20] The plaintiff's claim dismissed; the defendant's counterclaim dismissed; with no order as to costs; deposit of RM9,000 to be refunded to the plaintiff.

Claim and counterclaim dismissed with no order as to costs.

Reported by K Nesan